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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 373

WALTER H. DUISBERG,
Petitioner and Appellant below,

v.

JAMES E. MARKHAM, as Alien Property Custodian,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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[Note: Civil Procedure Rules 41(a)(2) and 41(b) are referred to throughout the petition and brief.]

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Statement of the Matter Involved

The Circuit Court has, upon the ground of "discretion," affirmed the District Court, which without trial dismissed with prejudice a complaint wherein plaintiff, a citizen of the United States (R. 6a, 9a),* sought to recover 1,975

* All references to appellee's appendix are by page number alone; all references to appellant's appendix are by page number followed by the letter "a."

shares of the capital stock—constituting 23% of all the outstanding capital stock (R. 53)—of General Dyestuff Corporation, a multi-million dollar corporation (R. 75a, 80a), which shares had been seized from him by the Alien Property Custodian. If the Alien Property Custodian has, in accordance with his indicated intention (R. 80a), disposed of the shares since the dismissal of this action, the only remaining issue is whether he shall be required to account to petitioner for the proceeds thereof.

This is a suit in equity, brought in the United States District Court for the District of New Jersey by Walter H. Duisberg, petitioner herein, against Leo T. Crowley (for whom James E. Markham was later substituted), individually and as Alien Property Custodian, respondent herein, under § 9(a) of the Trading with the Enemy Act [50 U. S. C. A. App. § 9], for a judgment decreeing that petitioner is the owner of 1,975 shares of the capital stock of General Dyestuff Corporation, expropriated by respondent, and directing respondent to deliver said shares of stock and the avails thereof to petitioner (R. 6a-8a).

The action was commenced on June 5, 1943 (R. 1a). Respondent made a motion to dismiss the complaint, which was granted as to respondent individually but denied as to respondent in his capacity as Alien Property Custodian (R. 1a-2a). On March 18, 1944, respondent filed his answer, which admits that petitioner is the record owner of the 1,975 shares, but denies that he is the beneficial owner thereof (R. 1a, 10a). [For reasons which hereinafter appear, the answer thus filed did not present the issues which were actually to be tried in this suit.]

Petitioner moved to strike out the first and second defenses and part of the third defense contained in the answer, and on May 3, 1944, the court entered an order granting petitioner's motion and directing that the answer be deemed amended accordingly (R. 2a, 55-57).

On May 15, 1944, petitioner served notice of motion for judgment on the pleadings; on June 5, 1944, an order was entered denying this motion upon respondent's express stipulation in open court to comply with a demand there-

after to be made by petitioner for specifications, which specifications, when filed, the court ruled would take the place of an amended answer (R. 3a, 43a, 19-21). The following day, June 6, 1944, petitioner served a demand for such specifications (R. 11a-14a), with which demand respondent complied in small part on June 9, 1944 (R. 3a, 16a-17a).

Since respondent's specifications thus filed were to stand in lieu of an amended answer, the earliest date at which it may be said that issue was joined in this action was June 9, 1944, even assuming that the specifications filed by respondent complied with his stipulation. Until that date, at the very earliest, petitioner was unable to undertake his preparation for trial, except upon the assumption that a plaintiff owes a duty to the court in which he commences an action, even prior to the joinder of issue, to prepare for trial with respect to every allegation of his complaint.

Prior to May 26, 1944, the New Jersey District Court's calendar of ready, undisposed-of cases to which the United States was a party comprised 46 cases, of which the instant action was the last (R. 129a-132a). On that date, May 26, 1944, the court, on defendant's *ex parte* application, fixed June 19, 1944, for the trial of this action (R. 3a, 108a). Judge Smith subsequently entered an order changing said trial date to June 21, 1944, peremptorily against petitioner, and further providing that if petitioner thereafter moved for a voluntary dismissal such dismissal was to be with prejudice (R. 3a, 14a-15a, 45).

The government's attorney conceded that the facts constituting the proof of the issues in this case "are extremely complex" (R. 84a). The complexity of the case was such as to require defendant to expend three months in the preparation of its motion and amended motion to dismiss the complaint and the court to expend seven months in the consideration and decision of that motion—a total of ten months (R. 1a-2a). The importance of the case and the anticipated length of the trial were such as to require the assignment of a judge from Michigan (Judge Lederle) for the special purpose of hearing this single case (R. 83a-84a,

22-24, 35-36). It was conceded that the trial would last between three weeks (defendant's estimate, R. 36) and seven weeks (plaintiff's estimate, R. 69a-70a).

Between the day when the case was lifted from its position of last case on the calendar and set down for trial, and the day when the complaint was dismissed with prejudice, twenty-six days elapsed. Between the day when issue was joined by the filing of defendant's specifications, and the day when the complaint was dismissed with prejudice, twelve days elapsed, including two Sundays. Of those twelve days, theoretically available to plaintiff for preparation for trial, eight days were consumed in defendant's examination before trial of one of plaintiff's principal witnesses and in defendant's discovery and inspection, at the offices of plaintiff's counsel, of a 24-foot pile of documents (R. 23a-25a, 49a-51a, 58, 62, 68-70).

The aura surrounding the disposition of this case—which has meant the confiscation of plaintiff's fortune—is apparent from the government attorney's attempt to create in the mind of a Michigan judge a prejudice against the insinuated dilatoriness of the New York bar (R. 80a), and from the accusations of dilatoriness levelled against plaintiff's counsel by the court, without specification (R. 44-45) and without substantiation in the record or in fact.

Plaintiff applied for a continuance in order to enable him to prepare for trial, which continuance was denied (R. 3a-4a, 84a, 90a, 138a, 142a, 143a, 153a).

Plaintiff thereupon made a motion, before Judge Lederle, under Rule 41(a)(2) for a voluntary dismissal (R. 139a, 143a).

Defendant asserted that he would be prejudiced were plaintiff's motion for a voluntary dismissal to be granted, since by virtue of § 9(a) of the Trading with the Enemy Act [50 U. S. C. A. App. § 9], the pendency of plaintiff's action operated as an injunction against disposition by defendant of the shares seized by him from plaintiff (R. 79a-80a). Plaintiff offered to obviate such prejudice by stipulating to waive the injunction (R. 74a-75a, 87a, 89a).

[In the Circuit Court of Appeals, defendant asserted, as a second ground of prejudice, that a substantial expenditure incurred by him in preparation for trial would have been lost had plaintiff's motion for a voluntary dismissal been granted (Appellee's C. C. A. brief, p. 30). No reason appears why any such prejudice could not have been obviated by the imposition of appropriate "terms and conditions," as was done in the many other cases arising under Rule 41(a)(2) cited in the accompanying brief.]

The court thereupon denied plaintiff's motion under Rule 41(a)(2) for a voluntary dismissal (R. 143a, 154a).

Defendant thereupon made a motion for an involuntary dismissal under Rule 41(b), which motion was granted by the court (R. 141a, 143a, 154a).

Judgment was thereupon entered dismissing the complaint with prejudice (R. 4a).

An appeal from said judgment and orders was taken by plaintiff to the Circuit Court of Appeals for the Third Circuit (R. 156a), which affirmed the judgment of the District Court (R. 72-74).

The questions involved on said appeal were (1) whether there had been a clear abuse of discretion by the District Court in denying plaintiff's motion for a continuance, (2) whether there had been a clear abuse of discretion by the District Court in denying plaintiff's motion for a voluntary dismissal under Rule 41(a)(2), and (3) whether there had been a clear abuse of discretion by the District Court in granting defendant's motion for an involuntary dismissal under Rule 41(b) without specifying that said dismissal was to be without prejudice,—which questions were decided by said Circuit Court of Appeals for the Third Circuit.

Jurisdictional Statement

1. The order of the United States Circuit Court of Appeals for the Third Circuit affirming the District Court's judgment was entered on May 25, 1944 (R. 74).

2. The jurisdiction of this court is invoked under § 240(a) of the Judicial Code [28 U. S. C. A. § 347].

3. The Circuit Court of Appeals for the Third Circuit has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision (Supreme Court Rule 38, par. 5(b)).

Questions Presented

1. Whether it constitutes a clear abuse of discretion for a court to deny a motion made by a plaintiff prior to commencement of trial to dismiss without prejudice under Rule 41(a)(2), where no legal prejudice or damage resulting from such dismissal is shown, or where, in the alternative, the prejudice or damage resulting from such dismissal may be completely obviated by the imposition of appropriate terms and conditions.

2. Whether it constitutes a clear abuse of discretion for a court to grant a motion made by a defendant prior to commencement of trial for an involuntary dismissal under Rule 41(b), without specifying that such dismissal shall be without prejudice, where plaintiff offers to stipulate to any terms or conditions which may be necessary or appropriate to obviate completely any prejudice or damage to defendant.

3. Whether Judge Smith's order of June 9, 1944 (to the extent that it provided, although no motion had then been made by either party for such relief, that any voluntary nonsuit thereafter taken would be with prejudice) was inconsistent with known legal procedure and constituted a clear abuse of discretion.

[In the event that this court grants the within petition for a writ of certiorari, petitioner asks leave to present to this court, upon the argument of such writ, the further

question of whether there was a clear abuse of discretion in the denial of plaintiff's application for a continuance of the trial herein. Petitioner does not advance error in that respect as a reason for this application for a writ of certiorari.]

Reasons Relied Upon for Allowance of Writ

1. The discretion vested in the court by Rule 41(a)(2) is a judicial discretion, not a personal discretion. It is the intent and purpose of that rule that the discretion vested in the court shall be exercised to determine whether a motion made by a plaintiff for a voluntary dismissal before the commencement of trial may be granted without resulting in any prejudice or damage to defendant which cannot be completely obviated by the imposition of appropriate terms and conditions. If non-obviatable prejudice or damage will be caused by the voluntary dismissal, the court is invested with judicial discretion to deny the motion. If obviatable prejudice or damage will be caused by the voluntary dismissal, the court is invested with judicial discretion to determine and impose the appropriate terms and conditions. Where a plaintiff, before commencement of trial, moves for a voluntary dismissal which will cause defendant obviatable prejudice or damage, the court may not abnegate its discretion by a dismissal of the action with prejudice and without terms, since to do so is in effect to assess against a plaintiff the full value of his cause of action as compensation to defendant for what may be relatively inconsequential damages caused by the voluntary dismissal.

2. The discretion vested in the court by Rule 41(b) is a judicial discretion, not a personal discretion. Where a defendant moves before the commencement of trial for an involuntary dismissal under that rule, the court is required to exercise judicial discretion to determine whether, in the light of stipulations or terms consented to by plaintiff, the order of dismissal should specify that it shall not operate as an adjudication upon the merits. A court, in

granting a motion under Rule 41(b), may not abnegate its discretion to determine whether the dismissal shall be with or without prejudice, since to do so is in effect to penalize a plaintiff to the full value of his cause of action for what may be a default resulting in inconsequential loss or damage to defendant.

3. Any interpretation of Rules 41(a)(2) and 41(b) which sanctions penalizing a plaintiff to the full value of his cause of action for failure to proceed to trial on the day set by the court, without regard to the damage actually caused to defendant by such failure to proceed to trial, constitutes a departure from the accepted and usual course of judicial proceedings.

Prayer for Writ

Wherefore your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Third Circuit, commanding said court to certify and send to this court a full and complete transcript of the record of the proceedings of the said Circuit Court of Appeals for the Third Circuit, had in the case numbered and entitled on its docket, No. 8730, Walter H. Duisberg, Plaintiff-Appellant v. James E. Markham, as Alien Property Custodian, Defendant-Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Third Circuit be reversed by this court, and for such further relief as to this court may seem proper.

Dated: August 24, 1945.

Respectfully submitted,

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